89-436

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Keene Corporation,

Petitioner,

--v.--

Independent School District No. 622,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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87 pp

QUESTIONS PRESENTED

Petitioner seeks a writ of certiorari granting review of a Minnesota state court decision requiring petitioner to produce documents in state court litigation which are under federal court seal and are absolutely privileged. The following questions would be raised in this writ:

1. Whether the state court violated petitioner's constitutionally protected rights by requiring that petitioner produce documents sealed by a Federal District Court order.

2. Whether the state court's order requiring petitioner to produce documents which are absolutely privileged constitutes a violation of petitioner's constitutional rights to the assistance of its counsel and access to the courts.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were Petitioner Keene Corporation, Respondent Independent School District No. 622, Bor-Son Construction, Inc., Corwin-Sepannen & Associates, Inc., and insulation sales company. The Respondent before this Court includes Independent School District No. 622.

Petitioner Keene Corporation has a single parent corporation, Bairnco Corporation.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Keene Corporation,

Petitioner,

--v.--

Independent School District No. 622,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

OPINIONS BELOW

The order of the Minnesota State Court was issued on February 2, 1989 and is not reported. The Minnesota Court of Appeals issued a decision on March 22, 1989, which is unreported. The Minnesota Supreme Court issued a decision denying further review on May 24, 1989, which is unreported.

JURISDICTION

Jurisdiction is proper pursuant to 29 U.S.C. § 1257(a) (1988) which provides for review by certiorari of final judgments or decrees rendered by the highest court of a State where "any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." The Minnesota Supreme Court filed its decision in this matter on May 24, 1989. Pursuant to 28 U.S.C. § 2101(c) (1988), petitioner may apply for a writ of certiorari within 90 days after the entry of such judgment or decree.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Due Process Clause, Fourteenth Amendment Supremacy Clause

STATEMENT OF THE CASE

FACTS

This litigation arises from a Minnesota state-court lawsuit concerning the use by Independent School District No. 622 of thermal insulation and acoustical products containing asbestos in the

construction of Tartan High School. Petitioner has never mined asbestos, or manufactured, fabricated, sold, distributed, or otherwise placed into commerce thermal insulation or acoustical products containing asbestos. Independent School District No. 622 ("Respondent"), however, has alleged in its Complaint commencing the Minnesota action that Petitioner is liable for the cost of removal and replacement of these materials. Petitioner denies liability for these costs.

In the course of the state court proceedings, Respondent served numerous discovery requests upon Petitioner. Most of the discovery concerned the activities of Keene Building Products Corporation ("KBPC"), Petitioner's former subsidiary or KBPC's corporate predecessors. Those

companies did, at one time, manufacture and sell thermal insulation and acoustical products, some of which contained asbestos. Petitioner sold its interest in KBPC to a third party in 1974.

On January 4, 1989, Respondent filed a Motion to Compel Production of Documents to which Petitioner had properly objected on grounds of privilege. The documents requested were the subject of the following discovery request:

> Produce any and all documents, exhibits or depositions utilized by any party in the case of Keene Corporation v. Insurance Company of North America (C.A.No. 78-1011 DCDC) as well as a complete index thereto.

The requested documents were generated by Petitioner and its counsel in connection with its defense of other asbestos related litigation and contain

information about Petitioner's strategies, settlement negotiations, and other work product information. These documents also contain attorney/client privileged information. Respondent apparently learned of the existence of these documents because Petitioner had been required to produce them and permit a deposition of its counsel's paralegal, David Rehbein, in an insurance coverage action filed by Petitioner in the United States District Court in Washington, D.C. (the "INA Action"). Petitioner and its insurer produced the documents in the insurance action solely in reliance upon a federal court order sealing the records and in accordance with its insurance carriers' obligations to defend Petitioner. Nevertheless, the school district sought production of these and other privileged

or sealed documents. The documents sought were still under seal by order of the D.C. federal court when requested in the Minnesota action.

On February 1, 1989, Judge J. E. Cass ordered Petitioner to produce the privileged and sealed documents, essentially requiring Petitioner to ignore the federal court order. He ordered Petitioner to comply with the order by January 27, 1989. In his order, Judge Cass did not find that the documents were not absolutely privileged. In fact, he gave no explanation whatsoever for his decision to require that Petitioner produce the documents.

Subsequently, Petitioner filed a Petition for a Writ of Prohibition or, in the alternative, for Discretionary Review in the Minnesota Court of Appeals.

Petitioner's petitions were summarily denied. In its denial of Petitioner's requests for extraordinary relief, the Minnesota Court of Appeals stated that Petitioner could merely produce documents kept in its document center rather than the privileged and sealed documents themselves, apparently not understanding that Petitioner had already made all the document center documents available, and that Petitioner's objection concerned other documents not available in the document center and generated long after any of those stored documents of its former subsidiaries. The Court of Appeals also ignored the fact that the discovery request sought the very depositions and documents belonging to others which were sealed by the federal court and which were not otherwise

available to Petitioner. Finally, the Court of Appeals failed to recognize that there was no challenge to Petitioner's claim of privilege as to these materials. Petitioner sought review of the Court of Appeals' decision by certiorari in the Minnesota Supreme Court but its petition was denied without hearing. Subsequently, Petitioner commenced a civil rights action in the federal district court for the State of Minnesota seeking injunctive relief to prevent the irreparable damage which would result upon enforcement of the state court order. Petitioner also sought to prohibit the state court from requiring Petitioner to violate the federal court's protection order by invoking the federal court's power to protect its own jurisdiction under the Supremacy Clause and the Anti-Injunction

Act. Petitioner's civil rights action was dismissed by the district court in part, in reliance upon Petitioner's right to petition this Court for review of the state court's order. See App. E.

FEDERAL QUESTION

Petitioner raised the issue of the conflict between the federal court's protective order and the proposed state court order in a number of memoranda to the trial court. See App. F. The trial court issued its order without comment on Petitioner's arguments.

The conflict issue was again raised in Petitioner's brief in support of its Petition to the Minnesota Court of Appeals for discretionary review or, in the alternative, a writ of mandamus. Petitioner raised its constitutional due process arguments at this time. See

App. G. The Court of Appeals rejected Petitioner's argument on the conflict issue. It failed to address Petitioner's claim that the trial court's order constituted a deprivation of Petitioner's constitutional due process rights. These arguments were again raised in Petitioner's application to the Minnesota Supreme Court for discretionary review. See App. H. The court summarily denied the petition and did not address the federal questions raised.

REASONS FOR ALLOWANCE OF WRIT

The United States Supreme Court should grant this Petition in order to resolve important issues of federal law. This Court should determine whether a state court may ignore a federal court's protective order and require a litigant to violate that order during state court

litigation. This Court should also determine whether Petitioner's compelling interests in protecting its constitutional rights to counsel and access to the courts require the Court to intervene to prevent the state court from enforcing its improper discovery order. These issues must be resolved now. Once Petitioner is required to violate the Federal court's order and Petitioner's privileged information becomes public, neither money damages nor court order will adequately repair the resulting injury to Petitioner's constitutional rights. The public interest will be served by jealously preserving Petitioner's right to the effective representation of its counsel in state court. Consequently, this court should grant Petitioner a Writ of Certiorari.

I. This Court Should Intervene To Prevent the Deprivation of Rights Protected by the U.S. Constitution

Petitioner seeks review by Writ of Certiorari because the state court order directly infringes on its constitutional due process rights to assistance of counsel and access to the courts. If Respondent gains access to Petitioner's privileged materials, the damage to Keene's constitutional rights will be immediate and irreparable.

A. The Right To Assistance Of Counsel

The state court order, which requires the disclosure of documents containing both confidential attorney-client communications and counsel's trial preparation materials, violates Petitioner's constitutional due process right to assistance of counsel. A civil

litigant has a due process right to the assistance of counsel. See Maness v. Meyers, 419 U.S. 449, 471-72 (1975) (Stewart, J., concurring); Powell v. State of Alabama, 287 U.S. 45, 69 (1932). See also Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) (a civil litigant has a right to the effective assistance of counsel); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1117-19 (5th Cir.), cert. denied, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed.2d 22 (1980) (the right to the advice and assistance of retained counsel in litigation is implicit in the concept of due process); Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (government cannot deny welfare recipients the right to secure for themselves representation of counsel); Roberts v. Anderson, 66 F.2d 874, 877 (10th Cir.

1933) (the right to be represented by counsel is a substantial one); McCuen v. Texas Power & Light Co., 714 F.2d 1255, 1262 (5th Cir. 1983) (right to counsel in civil cases is no less fundamental than same right in criminal cases).

The right to counsel in civil cases rests on the principle that, without the assistance of counsel, the constitutional guarantee of a fair hearing may be rendered meaningless. See Powell v. Alabama, 287 U.S. at 68. See also Goldberg v. Kelly, 397 U.S. at 270 (right to be heard of little avail if it does not comprehend right to be heard by counsel); Roberts v. Anderson, 66 F.2d at 876 (right to a hearing as essential of due process includes right to assistance of counsel of own choice). In ordering Petitioner's attorneys to produce

documents containing confidential attorney-client communications and counsel's trial preparation materials, the Minnesota court has directly infringed on Petitioner's constitutional right.

The order which demands the production of these materials is tantamount to compelling an attorney to testify as to how the attorney prepared the case. The subject of the depositions at issue is the handling of Petitioner's defense in asbestos related litigation. The witnesses discuss communications between Petitioner and its counsel, communications among counsel, defense strategy sessions and the role of Petitioner's national counsel, including the organization and handling of the many asbestos cases, case evaluation and

settlement negotiations. The protection of the matters addressed in the coverage action depositions from discovery by adverse parties is at the heart of the attorney-client privilege and the attorney work-product doctrine. If Petitioner's confidences and its attorney's strategy discussions were subject to discovery by adverse parties in the many asbestos cases, counsel could not possibly provide effective representation to its clients. Similarly, if the coverage action materials at issue here are to be produced to plaintiffs in the underlying cases, Petitioner faces a draconian choice: it can either abandon its efforts to obtain insurance coverage and the means to pay for its defense in the underlying tort cases, or it can risk rendering its defense attorneys impotent

by publishing through public discovery their communications, strategies and thought processes.

Disclosure of confidential attorney-client communications also improperly interferes with the ability of Petitioner's attorneys to render legal advice to Petitioner in connection with these cases. Such an interference with an attorney's ability to freely communicate with his client constitutes an infringement of the due process right to retain counsel. Potashnick v. Port city Const. Co., 609 F.2d 1101, 1119 (5th Cir. 1980); Anderson v. Sheppard, 856 F.2d 741, 746-47 (6th Cir. 1988). Courts uniformly hold that even a relatively brief interference with attorney-client communication constitutes a violation of the client's constitutional rights. See,

e.g., Potashnick, supra, (right to counsel should be freely exercised without infringement); Doe v. District of Columbia, 697 F.2d 1115, 1119 (D.C. Cir. 1983); Mudd v. United States, 798 F.2d 1513 (D.C. Cir. 1986); Swope v. Braton, 541 F. Supp. 109 (W.D. Ark. 1982). The Court of Appeals in Martin v. Lauer, gave this explanation of the constitutional dimensions of the attorney-client privilege:

> Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems. Through the attorney-client privilege, the common law "encourage[s] full and frank discussions between attorneys and their clients and thereby promote[s] broader public interests in the observance

> of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer being fully informed by the client." Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed.2d 584 (1981). Limitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused. Absent such abuse, or a waiver of the privilege, our legal system jealously protects the confidential status of attorney-client communications. Although an adversary may ordinarily inquire as to what the client knows, he "'cannot [compel him] to answer the question "What did you say or write to your attorney?"'"

Upjohn Co. v. United States, 449 U.S. at 396, 101 S. Ct. at 686 (quoting Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962). Respondent and the state court

cannot constitutionally interfere with Petitioner's confidential communications with its counsel by requiring that Petitioner disclose these confidences during state court litigation.

Moreover, the state court order, also interferes with counsel's representation of Petitioner because it would force Petitioner to disclose its attorneys' mental impressions, private memoranda and defense strategies. In doing so, the order completely ignores existing precedent and the underlying policies of the work-product doctrine. In this case, Petitioner's attorneys' ability to assist and defend their client is also interwoven with the right to preserve the confidentiality of its attorneys' strategies and mental impressions which are reflected in the

deposition transcripts and exhibits which were permitted to be taken in reliance on the Keene v. INA protective order. Cf. Martin v. Lauer, 686 F.2d 24, 32 (D.D.C. 1982).

This Court has held that an attorney's thought processes fall outside the arena of discovery. Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981) (work-product of corporation's general counsel revealing counsel's mental processes such as notes and memoranda are protected by the work product immunity). See also Hickman v. Taylor, 329 U.S. 495, 510 (1947); In re Murphy, 560 F.2d 326 (8th Cir. 1977). In fact, opinion work-product of the nature which is the subject of this action is entitled to absolute immunity from discovery. Duplan Corp v. Moulinage et

Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), cert denied, 420 U.S. 1975); In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973). Thus, the court said in Moulinage, "no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories." 509 F.2d at 733-34.

The reason for the adherence to this exemption from discovery is best summarized by Justice Murphy's opinion in Hickman v. Taylor where he stated:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence,

> briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case . . . as the "work product of the lawyer."
>
> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.

329 U.S. at 511.

422 U.S. at 238-39 (emphasis added).

The disclosure of Petitioner's privileged materials results in an unwarranted intrusion into defense counsel's preparation of their case.

This intrusion will seriously encumber defense counsel's ability to assist and defend Petitioner so as to constitute a clear infringement of Petitioner's constitutional right to the assistance of counsel.

B. The Right of Access To The Courts

Defendants' attempts to obtain privileged documents also constitute an impermissible interference with Petitioner's constitutional right of access to the courts. The right of access to the courts is based in the due process clause. Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir. 1983). It is basic to our system of government and is one of the fundamental rights protected by the Constitution. Id. at 971. This Court has characterized this right in the following language:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . .

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907). Consequently, this right is deserving of "rigorous protection." Martin v. Lauer, 686 F.2d 24, 33 (D.C. Cir. 1982).

A mere formal right of access to the courts does not pass constitutional muster. Id. Courts require that the access be "adequate, effective, and meaningful." Bounds v. Smith, 430 U.S. 817, 822, 97 S. Ct. 1491, 1495, 52 L. Ed.2d 72 (1977). Interference with the right of access to the courts can give rise to a claim for relief under § 1983.

Ryland, supra at 972. Accord Boddie v. Connecticut, 401 U.S. 371 (1971); Marello v. James, 810 F.2d 344, 348 (2d Cir. 1987); Simmons v. Dickhart, 804 F.2d 182 (1st Cir. 1984); Carter v. Hutto, 781 F.2d 1028 (4th Cir. 1986). Conduct which impedes a client's communications with his attorney constitutes an interference with the fundamental right of access to the courts. Martin v. Lauer, 686 F.2d 24, 33 (D.C. Cir. 1982).

Respondent case seeks disclosure of confidential attorney-client communications and attorney work-product. These materials are, however, absolutely immune from discovery. In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973). Absolute immunity is necessary to preserve the "freedom of thought essential to carefully reasoned trial

preparation." Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1984). Thus, the disclosure of these materials to Respondent and litigants across the country will render Petitioner's access to the courts meaningless as it will seriously impede Petitioner's attorneys' ability to defend Petitioner. This Court should grant review in order to protect Petitioner's constitutionally protected rights from state court interference.

C. Interference With Federal Court Order

The state courts have chosen to ignore the existence of the federal court's protective order which directly conflicts with the subject state court order. The federal district court in Minnesota has refused to issue an order enjoining the threatened violation of its sister court's order and has dismissed

Petitioner's civil rights action. Court should issue an order protecting the federal court jurisdiction from invasion by the state court. See 28 U.S.C. § 2283; Sperry Rand Corp. v. Rothlein, 288 F.2d 245 (2d Cir. 1961) (federal court properly enjoined state court litigant from using materials divulged during federal proceeding).

II. PETITIONER WILL SUFFER IRREPARABLE HARM IF THE STATE COURT'S ORDER IS ENFORCED; CONSEQUENTLY, THE ORDER IS REVIEWABLE.

The Minnesota court's discovery order is sufficiently final to be accorded review during the pendency of the state court proceeding. The issues raised in the discovery order are collateral to the issues in the trial court proceeding. Consequently, interlocutory review is appropriate. Cf.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Resolution of the matters raised by Petitioner in this appeal would not affect issues raised in the state court action and will not affect rights sought to be protected therein.

More importantly, if Petitioner is not granted review, it will irreparably lose any remedy for the deprivation of its constitutional rights. In the circumstances of this case, no post-deprivation remedy will suffice. Once the privileged material is disclosed, review will be ineffective. Courts have repeatedly recognized the inability of the judicial process to repair the damage done once privileged material is disclosed. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3rd Cir. 1984)

(compliance with a disclosure order destroys the right to be protected); Pfizer Inc. v. Lord, 456 F.2d 545, 548 (8th Cir. 1972) (appeal after disclosure of privileged information is an inadequate remedy); Jenkins v. Weinshienk, 670 F.2d 915, 917 (10th Cir. 1982). Consequently, review at this time is appropriate. See Cox Broadcasting Corp. v. Cahn, 420 U.S. 469 (1975). See also, Pennsylvania v. Ritchie, ____ U.S. ____, 107 S. Ct. 989 (1987); Florida v. Meyers, 466 U.S. 380, 381 (1984), North Dakota State Board of Pharmacy v. Snyder's Drug Stores Inc., 414 U.S. 156 (1973). Here, as in the above-cited cases, there is simply no way for the state court to preserve the federal questions raised for review upon conclusion of the entire case.

Consequently, immediate review is appropriate.

CONCLUSION

Petitioner's constitutional rights will be irreparably damaged if the state court order requiring production of privileged materials is enforced. Moreover, enforcement of the order will require Petitioner to violate a federal court's protective order. Consequently, Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Minnesota state court's order.

Dated: August 22, 1989.

Respectfully submitted,

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Independent School District
No. 622,

Plaintiff,

vs. ORDER

File No. C5-84-1701
Filed: Feb 02, 1989

Bor-Son Construction, Inc.;
Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret Hill Company and Keene Building Products Corporation);

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc., and Insulation Sales Company,

Third-Party Defendants.

The above-entitled matter came on for hearing before the undersigned, the Honorable J. E. Cass, Judge of the above-named Court, on January 12, 1989, at the Washington County Government Center, Stillwater, Minnesota.

Attorneys Michael R. Strom and J. Anderson Berly, III, appeared for an on behalf of Plaintiff. Attorneys Mary R. Vasaly, David F. Herr, and Sharon A. Merkle appeared for and on behalf of Defendant Keene Corporation. Attorney John M. Anderson appeared for and on behalf of Defendant and Third-Party Plaintiff Bor-Son Construction, Inc. Attorney Keith Dunder appeared for and on behalf of Third-Party Defendant Insulation Sales Company. Attorney Courtney LeNeavy appeared for an on behalf of Third-Party Defendant Corwin, Seppenan and Associates, Inc.

The Court, after considering the arguments of counsel and memoranda submitted, and based upon all of the files, records, and proceedings herein, makes the following:

ORDER

1. That Defendant Keene Corporation's Motion for a protective order precluding Plaintiff from taking the following noted depositions:

David M. Rehbein
Keene Corporation (Rule 30(b)(6) [sic] Depositions)
Harvey Wilson

and from obtaining documents requested in connection therewith, is hereby **DENIED** as to David M. Rehbein and **GRANTED as to Keene Corporation and Harvey Wilson.**

2. That Plaintiff's Motion for an Order:

1. Compelling Defendant Keene Corporation to answer fully, completely, and specifically Plaintiff's Fourth Set of Requests

for Production dated August 1988 as follows: Nos. 1 through 6:

2. Compelling Defendant Keene Corporation to answer fully, completely, and non-evasively, Plaintiff's Third Set of Interrogatories dated August 1988 as follows: Nos. 1 through 7, and 13 through 25,

is hereby **GRANTED.**

3. **That Plaintiff's Motion for an Order:**

1. Compelling Defendant Keene Corporation to comply with this Court's November 21, 1988 Order requiring it to:

(a) answer fully, completely, and non-evasively, Plaintiff's Interrogatories dated April 16, 1984 as follows: Nos. 16, 17, 25 and 27;

(b) provide full, complete, and specific responses to Plaintiff's Request for Production of Documents dated April 16, 1984 by identifying each box of documents in which each response can be found to the following Request for Production, to wit: Nos. 4 and 5 (as to product Pyrospray), 6 through 17, 20 through 23, and 25 through 28;

(c) answer fully, completely, and

specifically Plaintiff's Third Request for Production dated April 15, 1987;

(d) produce all documents responsive to Plaintiff's Request for Production dated October 29, 1986;

(e) provide to Plaintiff each of the items listed above no later than January 27, 1989;

is hereby **GRANTED**.

4. That Plaintiff's Motion for an Order granting costs and sanctions against Defendant Keene Corporation in the amount of $1,000.00 for repeatedly refusing to respond as previously ordered by this Court to Plaintiff's Interrogatories dated April 16, 1984, as well as Plaintiff's three sets of Requests for Production dated April 16, 1984, April 15, 1987 and October 29, 1986, and for deliberately disregarding this Court's November 21, 1988 Order, is hereby **DENIED**.

5. That the Washington County Court

Administrator shall serve a true and correct copy of this Order by u.S. mail upon the attorneys for the above-named parties which shall constitute due and proper service of this Order for all purposes.

Dated:_____ _____

J. E. Cass
Judge of District Court

STATE OF MINNESOTA

IN COURT OF APPEALS

Independent School District
No. 622,

Respondent,

vs.

ORDER

#C3-89-389
Filed: March 22, 1989

Bor-Son Construction, Inc.,
Keene Corp. (successor-in-
interest to Baldwin-Hill Co.,
Baldwin-Ehret Hill Co. and
Keene Building Products
Corp.),

Petitioner,

and

Bor-Son Construction, Inc.,
third-party plaintiff,

Respondent,

vs.

Corwin, Seppenan and
Associates, Inc., third-party
defendant,

Respondent,

Insulation Sales Co., third-party defendant,

Respondent.

Considered and decided by Wozniak, Chief J., Foley, J., and Nierengarten, J.

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

1. By order on November 21, 1988, the trial court compelled petitioner to provide additional discovery responses to interrogatories and requests for production posed in 1984, 1986, and 1987; and

2. By further order on February 1, 1989, the trial court denied petitioner's motion to quash the deposition of paralegal, directed petitioner to answer interrogatories posed in August 1988, and compelled compliance with the November 1988 discovery order; and

3. Petitioner seeks discretionary review, or a writ of prohibition, for

relief from the February 1, 1989 order; and

4. Prohibition will ie where the trial court has ordered disclosure of information which is clearly not discoverable, Mampel v. Eastern Heights State Bank of St. Paul, 254 N.W.2d 375, 377 (Minn. 1977), or where the trial court has so abused its discretion as to result in imminent injury for which no ordinary remedy, such as an appeal from the final judgment, is adequate, Hancock-Nelson Mercantile Co., Inc. v. Weisman, 340 N.W.2d 866 (Minn. Ct. App. 1983); and

5. Discretionary review is rarely appropriate in discovery disputes, absent a constitutional question or a pressing issue of broad application, Clark v. Monnens, ____ N.W.2d (Minn. Ct. App. March 21, 1989); and

6. Petitioner argues that much of the discovery sought by respondent school

district is directed to documents allegedly privileged or under seal by order of the federal courts; and

7. The district is not seeking the release of an discovery materials held by the federal courts, and is seeking only original documents, belonging to petitioner, and collected in the document center; and

8. It does not appear that any federal protective order prohibits petitioner from disclosing its <u>own</u> documents, merely because they were produced in other actions; and

9. Keene failed to establish the trial court has compelled disclosure of information which is clearly not discoverable, so as to justify the issuance of prohibition on petitioner's claim of privilege; and

10. Petitioner further objects to the trial court's requirement that it identify the specific boxes in the document center where answers to discovery requests may be found; and

11. Minn. R. Civ. P. 33.03 requires a party to specify "in sufficient detail as to permit the interrogating party to locate and to identify" records from which discovery answers may be ascertained; and

12. Keene has already produced many of the requested documents in connection with other suits, and has presumably reviewed many of the documents in connection with discovery on this matter, and it failed to establish the trial court so abused its discretion in requiring greater specificity as to justify the issuance of prohibition; and

13. Petitioner claims the trial court's allowance of the deposition of paralegal

Rehbein will permit inquiry into "areas protected by the attorney-client privilege and where work product could be disclosed"; and

14. The school district's motion papers in the trial court indicated the scope of the deposition would be limited to inquiry about the collection and destruction of documents; and

15. The trial court's order does not preclude petitioner from seeking a protective order in the course of the deposition, if a claim of privilege applies to a specific question posed by the district's counsel; and

16. Petitioner failed to establish the trial court has order disclosure of information which is clearly not discoverable, or so abused its discretion in permitting a limited deposition, and prohibition will not lie;

IT IS HEREBY ORDERED the petitions for prohibition and discretionary review are denied in their entirety.

Dated: March 21, 1989

BY THE COURT

_____

Chief Judge

C-1

STATE OF MINNESOTA

IN COURT OF APPEALS

C3-89-389
Filed May 24, 1989

Independent School District # 622,

Respondent,

vs.

Bor-Son Construction, Inc.,

Respondent,

Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret Hill Company and Keene Building Products Corporation),

Petitioner,

and

Bor-Son Construction, Inc., third-party plaintiff,

Respondent,

vs.

Corwin, Seppenan and Associates, Inc., third-party defendant,

Respondent,

Insulation Sales Co., third-party defendant,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Keene Corporation for further review be, and the same is, denied.

Dated: 5/24/89

BY THE COURT:

_____

Chief Justice

D-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Keene Corporation, a corporation,
Plaintiff,

v.

Judge J. E. Cass, et al.,

Defendants.

Civil File No. 3-89-378
Filed: 6/28/89

ORDER

David F. Herr, Esq., Maslon, Edelman, Borman & Brand, 1800 Midwest Plaza, Minneapolis, MN 55402, appeared on behalf of the plaintiff.

Peter M. Ackerberg, Esq., Special Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, MN 55103, appeared on behalf of Judge Cass.

Michael Sieben, Esq. Hertogs, Fluegel, Sieben, Polk, Jones, and LaVerdiere, P.A., 999 Westview Drive, Hastings, MN 55033, appeared on behalf of the remaining defendants.

Before the court is the motion of Keene Corporation for a temporary restraining order which the court will consider as a motion for a preliminary injunction,

pursuant to Fed. R. Civ. P. 65(a), and the defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

For the reasons set forth on the record following oral argument, the court denies the motion of Keene Corporation for preliminary injunction and grants the defendants' motion to dismiss. Accordingly, **IT IS ORDERED** that:

1. The motion of Keene Corporation for a preliminary injunction, pursuant to Fed. R. Civ. P. 65(a) is **DENIED**, and

2. The defendants' motion for dismissal, pursuant to Fed. R. Civ. P. 12(b)(1) is **GRANTED.**

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: June 23, 1989.

Paul A. Magnuson
United States
District Judge

E-1

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Keene Corporation,

Plaintiff,

v.

3-89-378 Civil
Dated: June 23, 1989

Judge J. E. Cass, not individually but as a Judge of the Minnesota District Court, Tenth Judicial District, et al.,

Defendants.

THE COURT: Okay. Before the Court is the motion of Keene Corporation for a temporary restraining order to which the Court, because of notice and briefing by both sides the Court considers as a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). Keene contends that a discovery order issued by Judge Cass in Independent School District Number 622 v. Bor-Son Construction, Inc., no. C5-84-1701,

violates Keene's federally-protected constitutional rights. Under the guise of a civil rights violation, Keene seeks to enjoin the enforcement of that order.

The Court has considered the record before it, including the submissions of counsel. The Court denies the motion of Keene Corporation for preliminary injunction and grants the dfendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

The Supreme Court held in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, that a Federal District Court is without authority to review final determinations of State Court in juridical proceedings. Id. at 476. The appropriate federal forum for review of such decisions is the United States Supreme Court. Keene pursued his appeal through the State

Appellate system. Having failed to obtain the desired relief, his only options were to seek review from the Supreme Court or to comply with the order.

In Harris v. Missouri Court of Appeals, 787 F.2d 427 (eighth Circuit 1986), cert. denied 107 S. Ct. 173, the plaintiffs brought suit under Section 1983 seeking monetary damages and injunctive relief against the Missouri Court of Appeals. Citing Feldman, the Eighth Circuit noted that a, "federal District Court has no authority to review a State Court's final judgment." Id. at 429. The Court also held that, "(i)ndividual judges are immune to civil suit when acting within their judicial capacity, even in Section 1983 civil rights actions." Id.

Based on Harris, this Court lacks subject matter jurisdiction not only because this Court is not the proper forum for review of

the underlying order, but also because the primary defendant, Judge Cass, is immuned from suit.

Counsel, the Court will enter a short form order in accordance with the brief ruling that I have made with respect to this today. I acknowledge that under the time constraints placed on all of us that this is a rather short form order on the matter.

I would reserve the right to enter a more formal order if I deemed that appropriate, but a more formal order would not be inconsistent with the short form order that has been presented today.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622,

File No. C5841701

Case Type: Product Liability

Plaintiff,

vs.

Bor-Son Construction, Inc.; and Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND FOR COSTS AND SANCTIONS

On January 4, 1989, Plaintiff filed a further motion to compel. Following this Court's Order of November 21, 1988, Keene supplemented its answers to interrogatories and is producing additional documents.

Plaintiff now sets forth further complaints regarding three of Keene's seventeen supplemental answers to Plaintiff's April 16, 1984 interrogatories.[1] Keene's supplemental answers were served pursuant to the November 21, 1988 Order.

Plaintiff's present motion also addresses supplemental responses which are yet to be served to Plaintiff's various requests for production of documents. Despite Keene's good faith efforts in compliance with the November 21, 1988 Order (See the Affidavit of Sharon A. Merkle and exhibits), Plaintiff accuses Keene of disregarding the Court's Order.

The present motion also seeks to compel further responses to Plaintiff's Fourth Set of Requests for Production of Documents dated August 1988 and Plaintiff's Third Set of Interrogatories dated August 1988. Copies of these requests are attached to the Affidavit of Sharon A. Merkle as Exhibits A and B, respectively.

Plaintiff's August 1988 requests for production of documents seek copies of documents which have been placed under seal by the United States District Court for the District of Columbia in an insurance coverage action brought by Keene against its insurers. A motion seeking discovery of these materials by counsel representing various plaintiffs in personal injury litigation in the State of Texas was denied in August of 1988 by the United States District Court.[2] Keene responded to Plaintiff's requests for production of these

documents by refusing to produce documents under seal in the coverage litigation. In a letter to Plaintiff's national counsel dated November 8, 1988, Keene's national counsel explained Keene's position. See Exhibit C to the Affidavit of Sharon A. Merkle.

Plaintiff's requests for production of documents served on Keene in August 1988 also seek the production of documents produced to the United States Government in an action in the United States Court of Claims. These documents were produced under the terms of a protective order issued by that Court. Keene responded to Plaintiff's request for these documents on September 9, 1988, declining to produce the documents on several grounds.

I. FACTUAL BACKGROUND

additional index in order to respond to Plaintiff's discovery requests in this case.

Based upon the foregoing, Keene respectfully requests that plaintiff's present motion to compel be denied in all respects and the Court issue an order holding that Keene is not required to undertake a separate review of the documents in its document center to select specific documents or to create an index of documents responsive to Plaintiff's discovery requests in this case.

By its fourth set of requests for production of documents, Plaintiff seeks production of documents which are under seal by order of the United States District Court for the District of Columbia and documents produced in a

Court of Claims action brought by Keene against the United States Government.

In 1978, Keene brought a coverage action against its insurers seeking a determination as to coverage with respect to the underlying asbestos personal injury claims. The issues in the litigation focused on the nature and quality of Keene's defense in the asbestos personal injury litigation. Parties to the coverage action included insurers which are not involved in the present case. Various records and testimony now sought by plaintiff herein were placed under seal by the federal court. Keene's argument as to why plaintiff's discovery must be disallowed is fully set forth on pages 4 through 14 of Keene's Memorandum in Support of its Motion for Protective Order. See also the Affidavit of Mary R.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

Independent School District No. 622 — File No. C5841701 Property Damage

Plaintiff,

vs.

Bor-Son Construction, Inc.; Keene Corporation (successor-in-interest to Baldwin-Hill Company, Baldwin-Ehret-Hill Company and Keene Building Products Corporation),

Defendants,

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Steppenan and Associates, Inc. and Insulation Sales Company,

Third-Party Defendants.

KEENE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

ARGUMENT

I. THIS COURT MUST SUPPRESS DISCOVERY ON THE INSURANCE COVERAGE DISPUTE.

Plaintiff's discovery requests are directed, in large part, to discover information from a discovery dispute between Keene and its liability insurers relating to coverage for certain claims. That action is pending in the United States District Court for the District of Columbia, and the various records and testimony plaintiff now seeks were place under seal by that court. The protective order sealing these records, dated March 30, 1984, is attached to the Affidavit of Mary M. Vasaly as Exhibit A.

This Court should grant Keene a protective order against the requested discovery for the following reasons:

(a) The information sought is subject to the Federal Court's seal, and

claims against Keene.

(e) The Minnesota Rules of Civil Procedure do not contemplate discovery of the information sought by plaintiff.

Keene filed its insurance coverage action in June 1978. Insofar as Keene is concerned, the action was substantially resolved by the May 13, 1983, decision of the federal court. Keene Corp. v. Insurance Co. of N. Am., No. 78-1011-JLG, slip op. (D.D.C. May 13, 1983). That decision is Exhibit B to the Affidavit of Mary R. Vasaly. Keene's claims for punitive damages based on bad faith were resolved in 1984, by settlement, on the eve of trial.

Solely in connection with Keene's claims for punitive damages for bad faith, Mr. David Rehbein was deposed by the insurance carriers in August and

September 1984. At the time of his deposition, Mr. Rehbein was (and still is) employed by Anderson Russell Kill & Olick (hereafter "ARKO"). See the attached Affidavit of Howard A. Mileaf (hereafter "Mileaf Aff." at ¶ 6.) ARKO served (and still serves) as Keene's national defense counsel in asbestos-related litigation, and Mr. Rehbein's duties at ARKO have consisted largely of acting as the administrator for the defense of the asbestos-related litigation involving Keene. Mileaf Aff. at ¶ 6. At his deposition, Mr. Rehbein discusses details of the management and adequacy of Keene's defense in asbestos-related litigation. Mileaf Aff. at ¶ 6. Thus, Mr. Rehbein's deposition testimony concerns privileged matters which plaintiff has no right to discover under

As shown above, Mr. Rehbein is an ARKO employee intimately involved in assisting Keene's attorneys in Keene's defense of asbestos-related litigation. See Mileaf Aff. at ¶ 6. As also shown, Keene would not have allowed Mr. Rehbein to testify concerning the conduct of Keene's defense and to produce the subject documents, absent a protective order covering his deposition and the exhibits to it. Mileaf Aff. at ¶ 8. Keene's justifiable reliance on the protective order in allowing Mr. Rehbein to testify as he did provides even more support for denying plaintiff's motion. See, e.g., Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658 (D.D.C. 1986) ("Tavoulareas").

In Tavoulareas, the defendant sought to lift a protective order pursuant to which

it had received voluminous discovery, without objection. In denying the motion with respect to documents not made a part of the public record at trial, the Tavoulareas court emphasized the fact that much of the discovery sought to be unsealed had been provided in reliance on the protective order:

> The Court must consider the fact that Mobil's cooperation in this process was obtained in reliance upon the blanket protective order, which included a requirement that the information be used only in preparation for litigation.

111 F.R.D. at 658-59. The Court found such reliance to be a "significant factor in determining whether to lift a seal on discovery materials." Id. at 659 (citations omitted). See also Martindell, 594 F.2d at 295, where the court stated:

> Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.[3]

This point also is demonstrated by H.L. Hayden Co. of N.Y. v. Siemen Med'l Sys., Inc., 106 F.R.D. 551 (S.D.N.Y. 1985), aff'd in part and dismissed in part, 797 F.2d 85 (2d Cir. 1985) ("Hayden"). In Hayden, the court denied a motion to modify a protective order, on multiple

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[3] Martindell distinguished Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326 (9th Cir. 1977), which vacated a lower court judgment rendered on a motion made by nonparties who had not expressly been granted leave to intervene, based on the fact that the party who might have opposed the nonparties' motion in Spangler had not had the opportunity to oppose the motion.

grounds, one of which was the parties' reliance on the order:

> The defendants' reliance on the protective order is also significant. The defendants proceeded with discovery under the expectation that the materials they disclosed would be used only for purposes of this lawsuit. The protective order facilitated a discovery process which the plaintiffs in their papers have described as "extensive and painstaking." The order was utilized to secure "the just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of an expensive, protracted and often bitter dispute.

Id. at 556. Thus, Keene's reliance on the protective order in allowing Mr. Rehbein to testify warrants denial of plaintiff's motion.

C. The Deposition Testimony and Documents Sought Have No Bearing on Plaintiff's Claims

STATE OF MINNESOTA

IN COURT OF APPEALS

Independent School
District No. 622

Plaintiff (Respondent),

vs.

PETITION FOR WRIT OF PROHIBITION

Bor-Son Construction, Inc.;
Keene Corporation
TRIAL COURT CASE
(successor-in-interest to
C5-84-1701
Baldwin-Hill Company, Baldwin-
Ehret-Hill Company and Keene
APPELLATE COURT CASE
Building Products
Corporation),

NO.:

NO.: _____

Defendants (Keene Petitioner),

and

Bor-Son Construction, Inc.,

Third-Party Plaintiff,

vs.

Corwin, Seppenan and
Associates, Inc. and
Insulation Sales Company,

Third-Party Defendants.

TO: The Court of Appeals of the State of Minnesota:

Petitioner, Keene Corporation ("Keene"), requests a Writ of Prohibition restraining the Washington County District Court from enforcing its order of February 1, 1989. Petitioner further requests that consideration of this petition be expedited and that the trial court's order be stayed pending its consideration so as to preserve the status quo.

REASON FOR EXTRAORDINARY RELIEF

Keene seeks review of the trial court's pretrial discovery order because its enforcement will result in immediate and irreversible harm to Keene. The issues in the discovery dispute before that court concerned disclosure of privileged information as well as the expenditure of extraordinary costs to meet plaintiff's demand that Keene not be allowed to respond to discovery by producing business records as kept in the ordinary course of business pursuant to Minn. R. Civ. P. 33.03. If the trial court's order is not reviewed now, Keene's rights with respect to these issues will be irretrievably lost.

Keene is entitled to the relief it seeks because the trial court's order constitutes a clear abuse of judicial discretion.

Even if the court had allowed time to do so, it would be impossible for Keene to review each of the four million documents in the document center in order to respond to plaintiff's discovery in this case. Certainly, the burden upon plaintiff to review the documents is no greater than the burden the trial court's order places upon Keene to do so. Production of business records which have been preserved as they were found as generated in the ordinary course of business is a sufficient response to plaintiff's discovery under the Minnesota Rules of Civil Procedure.

The trial court has inappropriately ordered the identification and production of documents which are privileged and have been sealed by another court. The court has also ordered that Mr. Rehbein testify at a deposition and produce documents in connection therewith concerning matters relating to Keene's defense which are absolutely privileged. If the privileged documents were to be disclosed and Mr. Rehbein were to testify, sensitive, confidential and privileged information would become public knowledge. Keene would have irretrievably its lost constitutional right to

counsel as well as its rights with respect to this privileged information. Consequently, Keene requests that the Court prohibit the trial court from enforcing its order requiring the disclosure of this information.

STATE OF MINNESOTA
IN SUPREME COURT

Independent School
District No. 622,

Plaintiff (Respondent),

PETITION OF DEFENDANT, KEENE CORPORATION, FOR REVIEW OF DECISION OF COURT OF APPEALS

vs.

Bor-Son Construction,
Inc., et al,

APPELLATE COURT CASE

NO. C3-89-389

Defendants,

Keene Corporation,

DATE OF FILING OF COURT OF APPEALS DECISION:
March 22, 1989

Defendant (Petitioner).

TO: The Supreme Court of the State of Minnesota:

Petitioner, Keene Corporation requests Supreme Court review of the decision of the Minnesota Court of Appeals upon the following grounds:

1. Keene's appeal and application for a writ presents several important questions upon which the Supreme Court should rule;
2. Keene's appeal raises questions concerning the constitutionality of the trial court's order;
3. The trial court has so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers; and

4. A decision by the Supreme Court will help to develop the law in several areas of discovery practice.

The Court of Appeals refused to reverse an unprecedented lower court order which violates Keene's privileges and prejudices its ability to defend itself in this and other actions. The order requires Keene to produce copies of documents which have been placed under seal by the United States District Court for the District of Columbia. It also requires Keene to produce an employee of its national litigation counsel for deposition. In addition, the order requires Keene to review over 4,000,000 documents in order to respond to discovery. The Court of Appeals has refused to protect Keene from imposition of these improper trial court orders. Given the grave impact of these orders upon Keene and their direct conflict with the order of the Federal Court and with normal discovery procedure, the Supreme Court should exercise its discretion to review the Court of Appeals' decision.

A. Documents Sealed by Court Order. Plaintiff's discovery requests and the trial court's order require Keene to produce copies of documents sealed by the Federal Court. Keene cannot produce these documents without violating that court's order. The Court of Appeals, however, failed to address this issue. The Court reasoned that Keene could

produce copies of documents generated by Keene rather than the sealed copies. (Opinion, ¶ 8.) In fact, the subject documents are not business records of KBPC or its subsidiaries, but are attorney work-product and other materials generated by Keene and others in connection with its defense of asbestos litigation and depositions taken in the coverage litigation concerning Keene's defense in the asbestos litigation. Thus, the trial court's order requires Keene to produce the very documents placed under seal by the Federal Court. Keene is entitled to Supreme Court guidance in its effort to comply with these conflicting court orders.

B. **Privileged Documents.** Keene also objects to the production of these documents on grounds of privilege. The trial court's order requires Keene to identify and produce documents which contain both confidential attorney-client communications and counsel's trial preparation materials. These documents concern Keene's handling of its defense of asbestos litigation such as this case. If this work-product information is disclosed in this action, Keene's ability to defend the many asbestos-related actions in which it is a defendant would be seriously prejudiced. It was precisely because of the catastrophic effect disclosure would have both upon Keene's ability to defend itself and the rights of other

parties that these materials were sealed. The trial court's order requiring the production of these documents in a case where their disclosure could impact asbestos litigation nationally represents an unprecedented intrusion into Keene's constitutional rights to due process and to retain counsel for its defense and a significant departure from the accepted and usual course of justice.

The Court of Appeals opinion focused only upon whether Keene may produce documents which have been sealed. The Court simply ignored the underlying basis for Keene's objection to the production of the documents - that they are absolutely privileged. Under Clark v. Monnens, 436 N.W.2d 830 (Minn. Ct. App. 1989), cited by the Court of Appeals, such a claim of privilege triggers review by the appellate court. The refusal of the Court of Appeals to address this issue mandates Supreme Court review.

C. The Document Center. In asking the court to prohibit enforcement of the trial court's order requiring Keene to review the millions of documents in its Document Center, Keene raises questions never before addressed in Minnesota: (1) whether a defendant may use the document center approach to respond to numerous competing discovery requests in cases where millions of documents may be potentially relevant in connection with thousands of cases

throughout the country; (2) whether a party may produce a set of business records as they are stored when the producing party is unfamiliar with the documents because the documents are those of another corporation.

Keene will be irreparably harmed if it is required to review all of the documents in the Document Center. The cost to review these documents actually exceeds the amount in dispute in this case and is simply unjustified. Once Keene has incurred the expense of reviewing the documents in the Document Center (assuming that this task is even possible), Keene will have no remedy for recoupment of these costs. Thus, the court's order unconstitutionally interferes with Keene's ability to defend itself in this action.

CONCLUSION

This case is one which is appropriate for Supreme Court review. Once the trial court's order is enforced, Keene will have irretrievably lost its constitutional right to retain counsel, its due process right to defend this and other litigation, and its rights with respect to privileged information contained in the documents at issue.

WHEREFORE the petitioner requests an order of the Court granting the Petition for Review of the Decision of the Court of Appeals.